Supreme Court of the United States

No. 30. OCTOBER TERM, 1918.

P. SANFORD ROSE, INC., CLAIMANT OF THE SCHOONER [illegible],

Appellant,

vs.

THE UNITED STATES OF AMERICA.

BRIEF FOR APPELLANT.

K. LEO EVERETT,

Of Counsel for Appellant.

Supreme Court of the United States.

No. 301 OCTOBER TERM, 1918.

P. SANFORD ROSS, INC., Claimant of the SCOW 6-S,
Appellant,

AGAINST

THE UNITED STATES OF AMERICA.

BRIEF FOR APPELLANT.

This appeal is taken from a final decree of the District Court of the Southern District of New York, made by the Honorable Learned Hand, District Judge, awarding to the United States the sum of $250 and costs against the scow *6-S*.

The libel of the Government was entitled a "libel of information" against the steamtug *Leonard Richards* and Scow *6-S* "in a cause of penalties civil and maritime for breach of the provisions of the Act of Congress of June 29, 1888 (25 Statutes at Large, 209), entitled 'An Act to prevent obstructive and injurious deposits within the harbor and adjacent waters of New York City by dumping or otherwise and to punish and prevent such offenses'" (fol. 1).

The claimant by its answer to the libel denied the power of the Court to entertain the suit, first on the

ground that the vessel was made liable by the statute for only such penalties as might be imposed in criminal proceedings on the persons involved in the illegal act, and that there had been in this case no conviction of such persons or assessment of penalties, and, second, that the assessment of such penalties was not within the admiralty or maritime jurisdiction of the Court (fols. 7 and 8).

A motion to dismiss the libel was made on the same grounds (fol. 11).

The Act under which the Government was proceeding (Act of June 29, 1888, chapter 496, 25 Statutes at Large, 209, as amended by the Act of August 18th, 1894, 28 Statutes at Large, 360, and the Act of May 28th, 1908, 35 Statutes at Large, 426) forbids by Section 1 the deposit of mud, etc.. in the tidal waters of New York harbor, except within the limits prescribed by the Supervisor, and provides that

> "every such act is made a misdemeanor, and every person engaged in or who shall aid, abet, authorize, or instigate a violation of this section, shall, upon conviction, be punishable by fine or imprisonment, or both, such fine to be not less than two hundred and fifty dollars nor more than two thousand five hundred dollars, and the imprisonment to be not less than thirty days nor more than one year, either or both united, as the judge before whom conviction is obtained shall decide."

Section 2 provides that the officers of any vessel towing a scow guilty of illegal dumping shall be punishable as provided in Section 1, and in addition have their licenses revoked.

Section 3 prescribes certain regulations as to dumping areas and the markings of vessels engaged in dumping.

Section 4 contains provisions for the disposal of dredged matter and a penalty for the violation thereof, and concludes as follows:

> "Any boat or vessel used or employed in violating any provision of this act, shall be liable to the pecuniary penalties imposed thereby, and may be proceeded against, summarily by way of libel in any district court of the United States, having jurisdiction thereof."

The Act has never been construed by this Court, the only appeal in which it was involved having been dismissed for failure to file a proper certificate. *The Bayonne,* 159 U. S. 687.

FIRST POINT.

The purpose of the statute was to make the vessel responsible for such pecuniary penalties as might be assessed against the offending persons in criminal proceedings, and in consequence, the conviction and fining of the persons in criminal proceedings is a condition precedent to the maintenance of a civil suit against the vessel.

This proposition is established by *The Strathairly,* 124 U. S. 558. The suit in that case was brought under Sections 4252, 4253, 4255, 4266 and 4270 of the Revised Statutes. These sections made various provisions for accommodations for passengers on vessels entering or leaving ports of the

United States and prescribed fines and penalties against the master and owner of the vessel for breach of such provisions. Section 4270 provided:

> "The amount of the several penalties imposed by the foregoing provisions regulating the carriage of passengers in merchant vessels shall be liens on the vessel violating those provisions, and such vessel shall be libeled therefor in any circuit or district Court of the United States where such vessel shall arrive."

The question before the court was as to the application of this section to the various fines and penalties prescribed by the other sections of the act. The Court held that Section 4270 applied to all of them. In respect to such provisions of the act as provided for *unliquidated* fines or penalties, the court said:

> "Neither is it an insurmountable inconvenience affecting this construction of the law that the extent of the lien declared by Section 4270 cannot be ascertained until after a conviction of the master and the assessment of the amount of the fine imposed upon him. This is undoubtedly true in respect to Section 4262, because there the fine is only made ultimately certain by the sentence of the court, to whom the discretion is confided of imposing any amount not in excess of $1,000" (p. 572).

The theory of the court is shown also in the concluding paragraph of the opinion:

> "Our conclusion, therefore, on the whole case is, that the libel sets out a sufficient cause of action, and entitles the United States, upon proof of the facts, to recover under the first and second counts, but that it must be dismissed as to the third. Under the first count, that recovery must be limited to the amount adjudged as a penalty against the master by way of fine upon the criminal information

against him. The penalty recoverable against the vessel, and which by Section 4270 is made a lien upon it, is not an additional penalty, but is the same penalty which by Section 4253 is to be adjudged against the master himself in the criminal prosecution for the misdemeanor, and payment on the part of either is satisfaction of the whole liability. It is the amount of that fine so assessed that is made a lien on the vessel. Under the second count it does not appear that any proceeding for the penalties therein sought to be recovered had been previously taken against the master. The difficulty of further proceeding under that count, however, is removed by a stipulation between the parties contained in the record" (p. 580).

The District Judge appreciated the force of this decision, but thought that the verbal differences between the two statutes, and especially the use of the word "summarily" in Section 4 of the Dumping Act, required a different construction of that Act. The Court accordingly interpreted the use of this word to mean that the vessel might be proceeded against without awaiting the criminal prosecution of the personal offenders. The effect intended for the word in the statute is not quite clear. A meaning different from that ascribed to it by the District Court, however, is suggested by the punctuation. The Act does not provide that the vessel "may be proceeded against, summarily, by way of libel, etc.", but that the vessel "may be proceeded against, summarily by way of libel, etc." This may well disclose an intention by Congress simply to describe the remedy in admiralty by libel as a summary remedy, which in essence it is, without at all meaning to provide that this remedy might be invoked prior to the assessment of the penalties in criminal proceedings. However that may be, the one thing

that does seem beyond controversy is the intent of the statute that the vessel shall be liable only for the penalties imposed upon the personal offenders in criminal proceedings. It clearly was not intended, for example, that the vessel might be proceeded against prior to criminal proceedings and fined $500 and the personal offenders afterwards tried in criminal proceedings and fined $250; nor, *vice versa* that the vessel might be subjected to a penalty of only $250 and the personal offenders on subsequent criminal trial fined $1,500, for which the vessel should not be answerable. It was plainly intended that the Government should have the right to recover from the vessel whatever penalty might be imposed on the personal offenders—no more and no less. Manifestly, this purpose cannot be effected if a civil suit in admiralty against the vessel is entertained and disposed of prior to the judgment in criminal proceedings.

The ruling purpose of the statute, therefore, requires the same decision in regard to this statute as that rendered by this Court in *The Strathairly* (*supra*) in regard to the statute under consideration in that case,—that is to say, that the conviction of the personal offenders and the imposition of pecuniary penalties, if any, upon them, must be deemed to be a condition precedent to the Government's right to proceed against the vessel.

SECOND POINT.

The District Court sitting in admiralty has no power to assess a penalty under the statute.

In every aspect the statute is a criminal statute.

The jurisdiction of the United States District Court is prescribed by Section 24 of the Judicial Code. Subdivision 3 of Section 24 gives jurisdiction "of all civil causes of admiralty and maritime jurisdiction." This necessarily excludes the possibility that there can exist in admiralty a criminal cause of admiralty and maritime jurisdiction such as existed in England by the statute of 15 Richard II, Chapter 2, as amended by 28 Henry VIII, Chapter 15 (Blackstone Commentaries, 268, 299).

Section 24 of the Judicial Code also provides that the District Court shall have jurisdiction of "all suits and proceedings for the enforcement of penalties and forfeitures incurred under any law of the United States." This section was construed by Judge Story in

> *United States* v. *Mann*, 1 Gal. 177; Fed. Cases No. 15,718.

The law at that time was in the form enacted by the statute of September 24, 1789, Section 9 (1 Stat. 76), in which the District Court was given "exclusive original jurisdiction of all suits for penalties and forfeitures enacted under the laws of the United States."

In a lengthy opinion Judge Story held that a suit for penalty or forfeiture did not apply to a criminal prosecution:

> "It is, then, incontrovertible that suits for penalties and forfeitures do not include crimes

> and offenses punishable by the district court, and if so, neither can they include such as are punishable by the circuit court. The words then must be restrained to such penalties and forfeitures as may be sued for in a civil action; as, for instance, an action of debt, or on information of debt. For I take it to be clear that an information of debt in the exchequer for a penalty is as much a civil proceeding, as an action of debt" (p. 1154).

The judicial machinery, therefore, as provided by the Judicial Code, does not allow the recovery of a criminal penalty, unliquidated in amount, except as the result of a criminal prosecution. The Government is driven to contend that the harmonious system of jurisdiction established by the Judicial Code has been modified and an anomalous situation created, by the concluding provision of Section 4 of the Dumping Act, and that notwithstanding that this is a criminal penalty, it may be sued for directly in a civil proceeding in admiralty by force of that provision. In

> *United States* v. *Atlantic Fruit Co.*, 206 Fed. Rep. 440.

the Court realized evidently the necessity of fixing the boundary to the civil jurisdiction of the District Court. The statute involved in that case required transportation companies importing alien imigrants to keep posted in the offices of their foreign agencies copies of the United States Immigration Laws, and provided as a penalty for violation thereof a fine not exceeding $500, recoverable in proper United States Court, and provided further that this fine should be a lien on any vessel of the defendant company found within the United States. It was contended that as the statute pro-

vided for a fine uncertain in amount, it could not be sued for civilly. Judge Noyes, writing the opinion of the Court, said:

> "There are two lines of authority leading up to this question. One line holds that while the word 'fine' ordinarily implies a criminal proceeding it may when the amount is fixed and definite be treated as an equivalent of the word 'penalty' and afford the basis for a civil action. Another line supports the proposition that when a statute imposes a penalty indefinite in amount, a civil suit may be brought for its recovery. But we are referred to no authority which goes quite to the question here and holds that a *fine* which is *uncertain* in amount may be sued for civilly" (p. 441).

The Court further observed that the failure to obey the act was not described as an offense or misdemeanor and that no reference was made to any criminal proceeding. It held therefore that a civil recovery was intended rather than a recovery in a criminal action, and sustained the suit.

Judge Ward, dissenting, expressed the opinion that the offense was indictable only, and that therefore a civil action could not be brought for the recovery.

The cases which apparently were in the mind of the court were

Chaffee v. *United States*, 18 Wall. 516;
Carrol v. *Green*, 92 U. S. 509;
Stockwell v. *United States*, 13 Wall. 531.

These cases all hold that the action of debt lies for a statutory penalty where the amount is fixed but does not lie for unliquidated damages.

In *Carrol* v. *Green* (*supra*), the Court said at page 513:

> "The action of debt lies on a statute where it is brought for a sum certain, or where the sum

> is capable of being readily reduced to a certainty. It is not sustainable for unliquidated damages."

See also

Hepner v. *United States,* 213 U. S. 103;
The Scotia, 39 Fed. 429;
United States v. *Foster,* 2 Biss. 453, Federal Cases 15,142;
Ex parte McNiel, 13 Wall. 236.

In *Hepner* v. *United States* (*supra*), a suit for liquidated penalty, the Court said:

> "It must be taken as settled law that a certain sum, or a sum which can readily be reduced to a certainty, prescribed in a statute as a penalty for the violation of law, may be recovered by civil action, even if it may also be recovered in a proceeding which is technically criminal" (p. 108).

The theory upon which liquidated penalties under criminal statutes have been recovered civilly is that upon commission of the offense a debt arises in favor of the Government against the offender for the amount of the penalty which is sued for, not as a punishment but strictly as a debt. The Court thereby applies the same principle which it does in a civil proceedings for forfeiture arising out of breach of a criminal statute. There are many such proceedings, *e. g.,* forfeiture of vessels for piracy, of liquors for breach of the revenue laws. In the forfeiture proceedings the theory is that the thing is the property of the Government the moment the offense is committed, and may be recovered by a proceeding *in rem.*

The theory is as old as the common law. Blackstone says:

> "Whatever, therefore, the laws order anyone to pay, that becomes instantly a debt,

which he had before contracted to discharge (Book III, 160).

"The same reason may with equal justice be applied to all penal statutes, that is such acts of parliament whereby a forfeiture is inflicted for transgressing the provisions therein enacted. The party offending is here bound by the fundamental contract of society to obey the directions of the legislature and pay the forfeiture incurred to such persons as the law requires" (Book III, 161).

In another passage, speaking of the information of debt by means of which penalties are recovered, he says that it lies—

"upon any contract for moneys due to the King, or for any forfeiture due to the Crown upon breach of a penal statute. This is most commonly used to recover forfeitures occasioned by transgressing those laws which are enacted for the establishment and support of the revenue; others, which regard mere matters of police and public convenience, being usually left to be enforced by common informers, in the *qui tam* information or actions of which we have formerly spoken" (Book III, 261-262).

THIRD POINT.

The proceeding is unconstitutional.

The Constitution provides that

"The trial of all crimes, except in cases of impeachment, shall be by jury" (Article 3, Section 2).

We have seen that it is only upon the theory of debt that a proceeding can be taken civilly without

the previous conviction of the offender. Where the theory of debt fails, the proceeding can be viewed only as a criminal proceeding, and this must be, pursuant to our Constitution (just as in England, under their Constitutional practice), by the due course of the Common Law.

LASTLY.

The decree should be reversed and the libel dismissed.

Respectfully submitted,

A. LEO EVERETT,
Of Counsel for Appellant.

April, 1919.